

**United States Department of Labor
Employees' Compensation Appeals Board**

PHILIP S. HEGEDUS, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Louisville, KY, Employer**

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**Docket No. 05-1203
Issued: October 12, 2005**

Appearances:

Fred R. Radlovich, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge

WILLIE T.C. THOMAS, Alternate Judge

MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 4, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 3, 2005, which denied his back injury claim. Appellant also appealed decisions dated February 7 and April 22, 2005, which denied reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues on appeal are: (1) whether appellant has met his burden of proof in establishing that he sustained a back injury in the performance of duty; and (2) whether the Office properly denied appellant's request for reconsideration without a merit review in decisions dated February 7 and April 22, 2005.

FACTUAL HISTORY

On November 3, 2004 appellant, then a 55-year-old distribution clerk, filed a claim alleging that he sustained a back injury on September 4, 2004 while shifting positions on a stationary stool. Appellant did not stop work.

Appellant submitted statements dated September 14 and October 13, 2004, which noted that he previously sustained injury from which he returned to a limited-duty position in December 2003.¹ Appellant noted that, from December 2003 to December 2004, his job duties required that he sit at a stationary stool without back support and turn from left to right. On September 4, 2004 he experienced a sharp pulling pain in his lower spine and numbness in his lower leg. Appellant came under the treatment of Dr. Steven D. Glassman, a Board-certified, orthopedist, who noted on September 8, 2004 that he treated appellant for an ongoing spine condition. He advised that appellant underwent a anterior fusion at C3-7 in 1997 and developed a proximal nonunion. Dr. Glassman advised that appellant thereafter underwent a posterior fusion at C3-4 and sustained chronic nerve damage related to his initial problem and surgery. He indicated that appellant recently developed pain at the distal aspect of the fusion, which he opined was due to degeneration at the C7-T1 level. Dr. Glassman noted findings upon physical examination of tenderness below the previous fusion, limited range of motion of the neck and low back and right leg pain. He indicated that a magnetic resonance imaging scan of the spine did not reveal nerve compression. Dr. Glassman opined that appellant's condition was related to the adjacent level pathology as well as to the surgeries performed on the cervical spine and was interfering significantly with his work. He recommended that appellant stay off work.

By letter dated December 2, 2004, the Office asked appellant to submit additional information, including a comprehensive medical report from his treating physician, which included a reasoned explanation as to how the specific work factors identified by appellant had contributed to his claimed back injury.

On December 16, 2004 appellant submitted a statement noting that on September 4, 2004 he injured his back. However, he was unable to report the injury to his direct supervisor, who was on an extended absence and the plant manager did not return his telephone calls. Also submitted was an attending physician's report from Dr. Glassman dated December 14, 2004. He noted a history of neck and upper back pain radiating into the neck and upper shoulder which developed into low back pain on September 4, 2004. Dr. Glassman diagnosed spondylolisthesis, adjacent level of degeneration at C7-T1, status postcervical spine fusion at C3-7 and low back pain. He noted with a checkmark "yes" that appellant's condition was caused or aggravated by employment activity.

In a decision dated January 3, 2005, the Office denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that his condition was caused by factors of his employment.

¹ Appellant advised that he filed an occupational disease claim, file number 06-2097344; however, it is unclear from the record whether this claim was accepted by the Office as work related. Nonetheless, appellant advised that he returned to a limited-duty position in December 2003.

On January 24, 2005 appellant requested reconsideration and noted that after his injury in September 2003, he returned to a limited-duty position in December 2003. On September 4, 2004 he reinjured himself. Appellant noted that Dr. Glassman submitted an erroneous (Form CA-20) which was corrected by his present treating physician. Appellant submitted an identical Form CA-20 dated December 14, 2004 signed by Dr. Glassman.

In a decision dated February 7, 2005, the Office denied appellant's reconsideration request on the grounds that his letter neither raised substantive legal questions nor included new and relevant evidence.

In a letter dated February 5, 2005, appellant requested reconsideration and submitted additional medical evidence. Appellant submitted a lumbar myelogram dated September 21, 2004, which revealed multilevel lumbar spondylosis which resulted in neural foraminal narrowing and mild spinal canal stenosis and Grade 1 anterior listhesis of L4 and L5 secondary to severe facet hypertrophy. In an attending physician's report dated February 1, 2005, Dr. Glassman noted a history of neck and upper back pain radiating into the neck and upper shoulder, which developed into low back pain on September 4, 2004. He diagnosed spondylolisthesis adjacent level of degeneration at C7-T1, status postcervical spine fusion at C3-7 and low back pain and noted with a checkmark "yes" that the condition was caused or aggravated by employment activity. Appellant also submitted a treatment note from Dr. George H. Raque, a Board-certified neurologist, dated January 14, 2005. He noted treating appellant for back pain with radiation to the right leg. He noted that appellant recently underwent a lumbar myelogram, which revealed moderate stenosis at L4-5 and a possible disc protrusion on the right. Dr. Raque opined that appellant could not presently undergo surgery but recommended epidural blocks.

In a decision dated April 22, 2005, the Office denied appellant's reconsideration request on the grounds that his letter neither raised substantive legal questions nor included new and relevant evidence and was insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act has the burden of establishing the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was filed within the applicable time limitation of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed is causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.²

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee

² Gary J. Watling, 52 ECAB 357 (2001).

actually experienced the employment incident which is alleged to have occurred.³ The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.⁴

Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁵ The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁶

ANALYSIS -- ISSUE 1

The Office found that the September 4, 2004 incident occurred as appellant alleged. The Board finds, however, that the medical evidence is insufficient to establish that appellant sustained a back injury causally related to the September 4, 2004 incident.

The medical records include Dr. Glassman's report dated September 8, 2004. He noted that appellant underwent an anterior fusion at C3-7 in 1997 and a posterior fusion at C3-4 and developed significant pain at the distal aspect of the fusion. However, Dr. Glassman failed to reference the shifting incident on September 4, 2004 nor did he provide a rationalized opinion regarding the causal relationship between appellant's back condition and the factors of employment believed to have caused or contributed to the condition.⁷ Rather, he attributed appellant's condition to degeneration at the C7-T1 level secondary to a previous problem and to the surgeries performed on the cervical spine. With regard to appellant's back injury, he merely noted that the described pain was a new symptom and he would "see how that sorts out." This report is insufficient to meet appellant's burden of proof. In subsequent reports, Dr. Glassman noted a history of neck and upper back pain radiating into the neck and upper shoulder, which developed into low back pain on September 4, 2004. He diagnosed spondylolisthesis and degeneration at C7-T1, status postcervical spine fusion at C3-7 and low back pain and noted with a checkmark "yes" that appellant's condition was caused or aggravated by an employment

³ *Michael E. Smith*, 50 ECAB 313 (1999).

⁴ *Id.*

⁵ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁶ *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

⁷ *Id.*

activity. The Board has held that an opinion on causal relationship which consists only of a physician checking “yes” to a medical form report question on whether the claimant’s condition was related to the history given is of little probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.⁸

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant’s condition became apparent during a period of employment nor the belief that her condition was caused, precipitated or aggravated by her employment is sufficient to establish causal relationship.⁹

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,¹⁰ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,¹¹ which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by the [Office]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.¹²

ANALYSIS -- ISSUE 2

Appellant’s January 24, 2005 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office.

⁸ See *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

⁹ See *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹⁰ 5 U.S.C. § 8128(a).

¹¹ 20 C.F.R. § 10.606(b).

¹² 20 C.F.R. § 10.608(b).

Appellant's request for reconsideration advised that after an initial injury in September 2003 he returned to a limited-duty position in December 2003 and on September 4, 2004 he reinjured himself. However, appellant's letter did not show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, he provided a duplicate copy of Dr. Glassman's attending physician's report dated December 14, 2004. Appellant indicated that the original Form CA-20 submitted by Dr. Glassman was erroneous and a more recent form was the correct version. However, the form he submitted was duplicative of evidence already contained in the record and was previously considered by the Office.¹³ The Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

With regard to appellant's February 5, 2005 request for reconsideration, the Board finds that he neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant submitted a lumbar myelogram dated September 21, 2004. However, this report is not relevant because it does not address the issue of relevant causal relationship. In an attending physician's report dated February 1, 2005, Dr. Glassman again indicated "yes" that appellant's diagnosed condition was caused or aggravated by an employment activity. This evidence is duplicative of that already contained of record and considered by the Office.¹⁴

In a January 14, 2005 treatment note, Dr. Raque addressed treating appellant for back pain with radiation down his right leg. However, this report is not relevant because it does not address the issue of whether appellant's September 4, 2004 incident caused or aggravated his back condition. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did he submit relevant and pertinent evidence not previously considered by the Office.¹⁵ Therefore, the Board finds that the Office properly denied appellant's requests for reconsideration without reviewing the merits of the claim.

¹³ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case; *see Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

¹⁴ *See Daniel Deparini*, *supra* note 13.

¹⁵ 20 C.F.R. § 10.606(b).

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he sustained a back injury causally related to his September 4, 2004 employment incident and that the Office properly denied appellant's requests for reconsideration without conducting a merit review of the claim.¹⁶

ORDER

IT IS HEREBY ORDERED THAT the April 22, February 7 and January 3, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 12, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ With his request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).